

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether appellant has met his burden of proof to modify a November 5, 1997 loss of wage-earning capacity (LWEC) determination.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 31, 1993 appellant, then a 35-year-old letter carrier, filed a notice of recurrence (Form CA-2a) claiming that he had originally sustained a herniated back disc in October 1991 or on February 26, 1993 and that he sustained a recurrence of disability on March 16, 1993 due to getting in and out of his mail truck multiple times while in the performance of duty.<sup>4</sup> He advised that he experienced low back pain/soreness and indicated that he was unsure if his back condition was a recurrence or a new low back injury. Appellant stopped work on March 16, 1993. On July 30, 1993 OWCP informed appellant that the claim filed on March 31, 1993 was considered to be for a new injury and would be developed as such. On August 18, 1994 it accepted his claim for lumbar strain and L4-5 disc herniation. OWCP authorized low back surgery, including L4-5 microdiscectomy on June 8, 1994 and L4-5, S1 spinal fusion with decompression of the right L5 nerve root/lateral recess on July 27, 1995.

On January 8, 1997 the employing establishment offered appellant a permanent, full-time position as a modified letter carrier. The duties of the position included setting up carrier routes for mail delivery, casing mail on other routes, and performing other duties as assigned within physical restrictions. The position had the same work restrictions as those set forth by Dr. Bruce Rudin, a Board-certified orthopedic surgeon, based on the findings of a November 25, 1996 functional capacity evaluation.<sup>5</sup> On January 10, 1997 appellant accepted the job offer and returned to work as a modified letter carrier.

By decision dated November 5, 1997, OWCP reduced appellant's compensation to zero effective that same date based on his ability to earn wages of \$36,577.00 a year as a modified letter carrier. It indicated that appellant had been employed in the position for over 60 days and noted that his actual wages exceeded the wages of the job he held when injured. OWCP determined that the position of modified letter carrier fairly and reasonably represented his wage-earning capacity.

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<sup>3</sup> *M.G.*, Docket No. 15-1015 (issued January 28, 2016).

<sup>4</sup> OWCP assigned the claim OWCP File No. xxxxxx707. The case record reflects that appellant sustained a low back strain on October 8, 1991 which was accepted under OWCP File No. xxxxxx725. OWCP File Nos. xxxxxx725 and xxxxxx707 have been administratively combined, with the latter designated as the master file.

<sup>5</sup> The work restrictions included lifting no more than 10 pounds, walking or standing no more than four hours per day, no bending below 20 degrees, squatting or stair usage no more than one hour, driving no more than three hours, and kneeling/twisting as tolerated.

On November 21, 1997 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on May 24, 1999. By decision dated August 2, 1999, OWCP's hearing representative affirmed the November 5, 1997 LWEC determination.<sup>6</sup>

On June 3, 2013 appellant filed a claim (Form CA-2a) alleging a recurrence of disability on April 17, 2013 due to his accepted March 16, 1993 employment injury. He alleged that his employment-related back condition had worsened.

Appellant subsequently submitted a June 3, 2013 report from Dr. Rudin who diagnosed degenerative lumbar disc and noted that appellant was unable to perform his current duties as a modified letter carrier. In reports dated June 20, 2013, Dr. Rudin noted that appellant had experienced a severe flare-up of symptoms of low back pain and lower extremity weakness on April 17, 2013. He described appellant's symptoms as emanating from the sacroiliac joint, adjacent to the two-level spinal fusions. Dr. Rudin opined that appellant's current condition was wholly causally related to his work injury of March 16, 1993 and that he was totally disabled from his position at the employing establishment. In an August 5, 2013 addendum to his June 20, 2013 report, he diagnosed lumbar sprain and degeneration of lumbar or lumbosacral intervertebral disc. Dr. Rudin noted that appellant was unable to perform any work duties which would require him to lift, bend, twist, stretch, or to sit or stand for longer than an hour at a time. He opined that he was not capable of returning to these duties due to the injury he suffered on March 16, 1993.

By decision dated October 7, 2013, OWCP denied appellant's claim for a recurrence of disability, finding that the evidence of record failed to establish a change in the nature and extent of his injury-related disability or a change in the nature of his light-duty job.

On October 15, 2013 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on April 22, 2014. By decision dated July 8, 2014, OWCP's hearing representative affirmed the October 7, 2013 decision.

On September 15, 2014 appellant, through counsel, requested reconsideration of the July 8, 2014 decision. He submitted a September 9, 2014 report from Dr. Obi Onyewu, Board-certified in pain management, who noted a history of appellant's March 16, 1993 work injury. Dr. Onyewu indicated that appellant reported that he stopped work on April 17, 2013 due to a worsening of his March 16, 1993 injury. He opined that, to a reasonable degree of medical probability, the treatment appellant was receiving at the spine center was causally related to the March 16, 1993 work injury.

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<sup>6</sup> In July 2008 appellant began working in a full-time position as a modified letter carrier with an annual salary of \$51,252.00. The position duties included casing mail, delivering Express Mail, and assisting with mark-up mail. In May 2009 appellant began working in another full-time position as a modified letter carrier with an annual salary of \$53,684.00. The position duties included casing mail and delivering Express Mail.

By decision dated December 10, 2014, OWCP denied modification of the July 8, 2014 decision.

Appellant appealed to the Board and, by decision dated January 28, 2016, the Board set aside the December 10, 2014 decision and remanded the case to OWCP for proper development as a request for modification of the November 5, 1997 LWEC determination, rather than as a recurrence of disability.<sup>7</sup>

In a June 9, 2016 development letter, OWCP advised appellant of the standards for modifying an LWEC determination and afforded him 30 days to submit additional evidence. In a June 21, 2016 letter, counsel referenced previously submitted reports of Dr. Rudin and Dr. Onyewu.

By decision dated August 26, 2016, OWCP denied modification of the November 5, 1997 LWEC determination. It found that the evidence of record was insufficient to support such modification.

On September 8, 2016 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on January 19, 2017.

Appellant subsequently submitted an April 24, 2013 magnetic resonance imaging (MRI) scan of the lumbar spine which contained an impression of minimal retrolisthesis at L2-3, diffuse disc bulge with foraminal protrusion and canal stenosis, and mild right foraminal narrowing at L3-4. An August 28, 2013 electromyogram and nerve conduction velocity (EMG/NCV) study revealed chronic bilateral L4-5 motor radiculopathy and axonal motor sensory peripheral polyneuropathy.

By decision dated February 23, 2017, OWCP's hearing representative set aside the August 26, 2016 decision and remanded the case to OWCP for further development of the medical evidence. The hearing representative instructed OWCP to refer appellant for a second opinion examination and evaluation of whether a worsening of his employment-related condition caused or contributed to an inability to work on or after April 17, 2013.

On March 30, 2017 OWCP referred appellant for a second opinion examination to Dr. Robert A. Smith, a Board-certified orthopedic surgeon. It provided him with a statement of accepted facts (SOAF) and requested that he evaluate whether appellant was unable to work on or after April 17, 2013 due to a worsening employment-related condition.

In a report dated April 17, 2017, Dr. Smith discussed appellant's factual and medical history and provided results on physical examination. He opined that appellant's lumbar degenerative disc disease and L4-5 radiculopathy were not caused, aggravated, accelerated, or precipitated by the original work injury. Dr. Smith further noted that the medical data and physical examination findings did not support any worsening of appellant's accepted employment condition

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<sup>7</sup> *Supra* note 3.

on or around April 17, 2013. He indicated that appellant could return to sedentary duty on a full-time basis.

By decision dated June 21, 2017, OWCP denied modification of the November 5, 1997 LWECD determination.

On June 27, 2017 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on October 24, 2017.

Appellant submitted the findings of an August 21, 2017 EMG/NCV study which contained an impression of bilateral L4-S1 motor radiculopathy without acute change and diffuse sensory peripheral polyneuropathy. A CT scan of the lumbar spine dated September 5, 2017 revealed satisfactory postoperative changes at L4 through S1 and L5-S1, mild bilateral lateral recess and neural foraminal narrowing, L2-3 disc displacement with facet arthropathy, L3-4 concentric disc displacement, moderate canal stenosis, bilateral lateral recess, and neural foraminal narrowing.

By decision dated January 2, 2018, OWCP's hearing representative set aside the June 21, 2017 decision and remanded the case for further medical development. The hearing representative instructed OWCP to refer appellant back to Dr. Smith for a supplemental opinion addressing whether the recent EMG/NCV study and CT scan changed his opinion as to whether appellant's lumbar degenerative disc disease and L4-5 radiculopathy were caused or aggravated by an employment event, and whether appellant experienced a worsening of the accepted employment conditions effective April 17, 2013.

On January 16, 2018 appellant submitted several reports, dated between December 5, 2016 and September 18, 2017, discussing treatment provided by Dr. Frank Falco, a Board-certified anesthesiologist. Dr. Falco diagnosed chronic pain syndrome, mechanical complication of nervous system device, post-laminectomy syndrome of the lumbar region, radiculopathy of the lumbar region, and neck pain. He reported improved radicular pain on the right side with a spinal cord stimulator (SCS) implantation and recommended a revision of this device.

On February 9, 2018 OWCP requested a supplemental report from Dr. Smith. On March 22, 2018 Dr. Smith indicated that he would not provide a supplemental report.

On May 3, 2018 OWCP referred appellant for a second opinion evaluation to Dr. Steven J. Valentino, a Board-certified orthopedist. It requested that he evaluate whether appellant was unable to work on or after April 17, 2013 due to a worsening employment-related condition.

In a report dated May 22, 2018, Dr. Valentino reviewed the records provided to him and provided results on physical examination. He diagnosed status post lumbar discectomy and status post lumbar decompression with instrumented fusion. Dr. Valentino noted that appellant's history was significant for hypertension and diabetes. He reported findings of obesity, moderately restricted cervical and thoracic range of motion with pain, and decreased sensation in the right leg in a sock-like distribution. Dr. Valentino opined that the diagnosis of aggravation of adjacent segment disease was not supported. He noted that degenerative changes above the surgical fusion were mild and consistent with natural age-related degenerative changes opposed to accelerated

degenerative changes from the L4-S1 fusion surgery. Dr. Valentino further noted that the recent EMG/NCV study revealed L4-S1 motor radiculopathy and polyneuropathy consistent with appellant's history of diabetes. He opined that he found no evidence to substantiate material worsening of appellant's employment-related low back condition. In support of his opinion, Dr. Valentino noted diagnostic studies which confirmed a solid fusion. He opined that he found no objective evidence to support a worsening of appellant's employment-related medical condition, without intervening injury, which resulted in new or increased work-related disability on April 17, 2013, the day appellant stopped work. Dr. Valentino further opined that there was no evidence in the case record, including diagnostic studies, which showed that the accepted conditions had materially worsened to the point where appellant was not able to perform the position of modified letter carrier as of April 17, 2013.

By decision dated June 19, 2018, OWCP denied modification of the November 5, 1997 LWEC determination. It found that the weight of the medical evidence rested with the opinion of Dr. Valentino who determined that appellant's work stoppage on and after April 17, 2013 was not due to a worsening employment-related condition.

On June 26, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on December 11, 2018. By decision dated February 13, 2019, OWCP's hearing representative affirmed the June 19, 2018 decision.

### **LEGAL PRECEDENT**

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.<sup>8</sup> Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>9</sup> A determination regarding whether actual earnings fairly and reasonably represent one's wage-earning capacity should be made only after an employee has worked in a given position for at least 60 days.<sup>10</sup> Wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs, a temporary position when the position held at the time of injury was permanent, or a position that is seasonal in an area where year-round employment is available.<sup>11</sup>

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<sup>8</sup> 5 U.S.C. § 8115(a); *see O.S.*, Docket No. 19-1149 (issued February 21, 2020); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

<sup>9</sup> *See J.A.*, Docket No. 18-1586 (issued April 9, 2019).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

<sup>11</sup> *See M.S.*, Docket No. 19-0692 (issued November 18, 2019); *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, *id.* at Chapter 2.815.5c (June 2013).

Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.<sup>12</sup>

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.<sup>13</sup> OWCP's procedures provide that, "[i]f a formal [LWEC] decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal [LWEC]."<sup>14</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>15</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to modify a November 5, 1997 LWEC determination.

With respect to the first basis for modifying an LWEC determination, appellant has not demonstrated that the November 5, 1997 LWEC determination was erroneous.<sup>16</sup> On January 10, 1997 he returned to work for the employing establishment as a modified letter carrier. The position had the same work restrictions as those recommended by Dr. Rudin, an attending physician. It was not an odd-lot or make-shift position and appellant worked in the position for more than 60 days prior to the issuance of the November 5, 1997 LWEC determination.<sup>17</sup> Therefore, appellant has not presented evidence showing that the November 5, 1997 LWEC determination was erroneous when issued.

Further, the Board notes that appellant has alleged that his accepted conditions worsened such that he became totally disabled from all work as a result of the accepted employment conditions commencing April 17, 2013. Since OWCP found that appellant could perform the duties of a modified letter carrier, the issue is whether there has been a material change in his work-related condition that would render him unable to perform those prescribed duties.<sup>18</sup> This is

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<sup>12</sup> See *M.F.*, Docket No. 18-0323 (issued June 25, 2019).

<sup>13</sup> *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>14</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.812.9(a) (June 2013); *D.T.*, Docket No. 18-0174 (issued August 23, 2019); *J.B.*, Docket No. 17-0817 (issued April 26, 2018); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

<sup>15</sup> *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

<sup>16</sup> See *supra* note 13.

<sup>17</sup> See *supra* notes 10 and 11.

<sup>18</sup> *D.Q.*, Docket No. 17-1220 (issued May 18, 2018); *Phillip S. Deering*, 47 ECAB 692 (1996).

primarily a medical question.<sup>19</sup> In reviewing the medical evidence of record, the Board finds that appellant has failed to provide sufficient evidence to establish that a modification of the November 5, 1997 LWEC determination is warranted under the basis of a worsening of his injury-related condition.<sup>20</sup>

The Board finds that the weight of the medical evidence rests with the well-rationalized opinion of Dr. Valentino, OWCP's referral physician.<sup>21</sup> The Board has noted that in assessing medical evidence the weight of such evidence is determined by its reliability, its probative value and its convincing quality and the factors which enter in such an evaluation include the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.<sup>22</sup>

In a May 22, 2018 report, Dr. Valentino diagnosed status post lumbar discectomy, status post lumbar decompression with instrumented fusion. He opined that degenerative changes above the fusion were mild and consistent with natural age-related degenerative changes opposed to accelerated degenerative changes from L4-S1 fusion. Dr. Valentino further noted that an EMG/NCV study revealed L4-S1 motor radiculopathy and polyneuropathy consistent with appellant's history of diabetes. He opined that there was no evidence in the case record which showed that the accepted conditions had materially worsened to the point where appellant was not able to perform the position of modified letter carrier as of April 17, 2013.

The Board has carefully reviewed Dr. Valentino's May 22, 2018 report and notes that it has such reliability, probative value, and convincing quality. Prior to reaching his conclusions, Dr. Valentino extensively detailed appellant's factual and medical history and reported the findings of his examination of appellant. He had the benefit of a SOAF which delineated those employment-related incidents and conditions accepted as compensable employment factors. Moreover, Dr. Valentino provided a proper analysis of the factual and medical history and the findings on examination and reached conclusions regarding appellant's condition which comported with this analysis.

Appellant submitted other medical evidence which he believed showed a change in his injury-related condition sufficient to warrant modification of the November 5, 1997 LWEC determination, but the Board finds that these reports are of limited probative value with respect to

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<sup>19</sup> *R.S.*, Docket No. 15-1229 (issued October 2, 2015).

<sup>20</sup> *See R.L.*, Docket No. 15-1337 (issued January 27, 2016).

<sup>21</sup> The Board notes that OWCP initially referred appellant for a second opinion examination with Dr. Smith, who produced a report dated April 17, 2017. OWCP determined that another opinion was necessary as Dr. Smith did not properly resolve the issue before him, specifically whether appellant's accepted employment condition worsened in April 2013, resulting in disability. *See Ayanle A. Hashi*, 56 ECAB 234 (2004) (when OWCP refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, OWCP should secure an appropriate report on the relevant issues).

<sup>22</sup> *See W.C.*, Docket No. 18-1386 (issued January 22, 2019); *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1959).

this matter. He had submitted a June 3, 2013 report, Dr. Rudin diagnosed degenerative lumbar disc and noted that appellant was unable to perform his current duties as a modified letter carrier. In a report dated June 20, 2013, Dr. Rudin indicated that appellant had experienced a severe flare up of symptoms of low back pain and lower extremity weakness on April 17, 2013. He opined that appellant's current condition was wholly causally related to his employment injury of March 16, 1993 and that he was totally disabled from his position at the employing establishment. In an August 5, 2013 addendum to his June 20, 2013 report, Dr. Rudin diagnosed lumbar sprain and degeneration of lumbar or lumbosacral intervertebral disc. He noted that appellant was unable to perform any work duties which would require him to lift, bend, twist, stretch, or to sit or stand for longer than an hour at a time and opined that he was not capable of returning to these duties due to the March 16, 1993 injury.

The Board finds that these reports are of limited probative value because Dr. Rudin did not describe objective findings, accompanied by adequate medical rationale, to support a material worsening of appellant's accepted employment-related back conditions. The Board has held that medical conclusions unsupported by facts and rationale are of limited probative value.<sup>23</sup> Dr. Rudin did not explain why appellant was unable to perform the duties of the modified letter carrier on which the November 5, 1997 LWEC determination was based or explain why any inability to work would be related to the accepted employment conditions. The Board finds Dr. Rudin's opinion insufficient to establish a material change in the injury-related conditions such that the November 5, 1997 LWEC determination should be modified.<sup>24</sup>

In a September 9, 2014 report, Dr. Onyewu noted a history of appellant's work injury on March 16, 1993 and noted that on April 17, 2013 appellant stopped work due to a worsening of his original employment injury. He opined, to a reasonable degree of medical probability, that the treatment appellant was receiving at the spine center was causally related to the March 16, 1993 employment injury. Dr. Onyewu's report does not establish, with medical rationale, that appellant had experienced a worsening of the accepted medical conditions with no intervening injury resulting in new or increased work-related disability.<sup>25</sup> He did not explain why appellant's medical condition after April 2013 had worsened such that he could not perform the duties of the modified letter carrier or explain how appellant's condition/work ability was related to the accepted employment conditions. This report is thus insufficient to warrant modification of the November 5, 1997 LWEC determination.<sup>26</sup> The case record also contains reports from Dr. Falco, dated from December 5, 2016 through September 18, 2017, which noted treatment for chronic pain syndrome, neck pain, and chronic intractable pain of the low back with radiculopathy. These reports do not provide any rationalized medical opinion that appellant's employment-related

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<sup>23</sup> *C.B.*, Docket No. 08-2268 (issued May 22, 2009).

<sup>24</sup> *B.B.*, Docket No. 17-1757 (issued March 14, 2018).

<sup>25</sup> *See D.T.*, Docket No. 18-0174 (issued August 23, 2019).

<sup>26</sup> *Id.*

medical condition had materially worsened to cause further disability. Therefore, they also are insufficient to establish that the November 5, 1997 LWEC determination should be modified.<sup>27</sup>

The Board further notes that appellant has not alleged, as a basis for modification of the November 5, 1997 LWEC determination, that he had been retrained or otherwise vocationally rehabilitated.<sup>28</sup>

Counsel asserts on appeal that the reports of Dr. Rudin and Onyewu were sufficient to establish that appellant was totally disabled beginning April 17, 2013. However, the Board finds, for the reasons explained above, that the medical evidence of record fails to establish a material worsening of the accepted employment conditions such that appellant was precluded from performing his duties as a modified letter carrier during the claimed period. Thus, appellant has not met his burden of proof to modify the November 5, 1997 LWEC determination.<sup>29</sup>

Appellant may request modification of an LWEC determination, supported by new evidence or argument, at any time before OWCP.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to modify a November 5, 1997 LWEC determination.

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<sup>27</sup> *Id.*

<sup>28</sup> *See supra* note 13.

<sup>29</sup> *S.J.*, Docket No. 17-0449 (issued May 7, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 13, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 18, 2020  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board